

file



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of James Komarek for Riprap Permit
on Lake Nokomis, Town of Nokomis, Oneida
County, Wisconsin

Case No. 3-NO-98-0002

ORDER OF DISMISSAL

James Komarek, 41W189 Burlington Road, St. Charles, Illinois, 60175, filed an application with the Department of Natural Resources on August 20, 1998, pursuant to sec. 30.12(3), Wis. Stats., for a permit to place rock riprap along the shoreline of Lake Nokomis, Oneida County in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 35, Township 36 North, Range 6 East.

On October 23, 1998, the Department issued an Order denying the permit application. On November 18, 1999, Attorney Mark A. Sauer, on behalf of James Komarek, requested a hearing pursuant to sec. 227.42, Stats., regarding the denial with the Department of Natural Resources. By letter dated November 30, 1999, the Department granted the request for a contested case hearing. On January 19, 1999, the matter was referred to the Division of Hearings and Appeals. A telephone prehearing was held on February 15, 1999.

Pursuant to due notice hearing was held on April 6, 1999, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James Komarek, by

Attorney Thomas F. Mallery
Attorney Mark A. Sauer
Mallery & Zimmerman, S.C.
P. O. Box 479
Wausau, WI 54402-0479

Wisconsin Valley Improvement Company, by

Attorney Bradley D. Jackson
Attorney Michelle M. Umberger
Foley & Lardner
P. O. Box 1497
Madison, WI 53701-1497

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott
P. O. Box 7921
Madison, WI 53707-7921

SUMMARY OF PROCEEDINGS

The matter came on for hearing on April 6, 1999. The applicant presented his case. At the close of the applicant's case, both the Department of Natural Resources (DNR) and the Wisconsin Valley Improvement Company (WVIC) moved to dismiss the matter because the applicant had not carried his burden of demonstrating by a preponderance of the credible evidence that he was the riparian owner of the parcel described above. The applicant's own registered land surveyor opined that the applicant had demonstrated that he was the riparian owner of only 12 to 14 feet of the approximately 217 feet of frontage abutting the Lake Nokomis flowage. Further, the applicant was the riparian owner of this 12 to 14 feet only if it was assumed that the 30 foot strip described in Ex. 7 and Ex. 16 was fixed in location and not tied to the ordinary highway mark (OHWM). The ALJ, based upon the record developed in the applicant's case, found such a reading to be impractical and flawed as a matter of fact and law. The applicant, despite excellent representation by counsel and the surveyor, was unable to establish riparian ownership. It was clear that the DNR had properly denied the riprap application under sec. 30.12(3)(a)(3), Stats. Accordingly, the motion was granted and the matter dismissed.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the petition to review the decision of the DNR be DISMISSED, with prejudice.

Dated at Madison, Wisconsin on April 8, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.